FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No. 379

COLORADO INTERSTATE GAS COMPANY,
a corporation, Petitioner,

v.

FEDERAL POWER COMMISSION, CITY AND COUNTY OF DENVER, COLORADO, PUBLIC SERVICE COMMISSION OF WYOMING, COLORADO-WYOMING GAS COMPANY, PUBLIC SERVICE COMPANY OF COLORADO, and CANADIAN RIVER GAS COMPANY, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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July, 1944

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner herein respectfully prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered July 8, 1944, (R. V. 8, p. 5094) affirming an order of the Federal Power Commission under the Natural Gas Act of 1938 (52 Stat. 821; Title 15, U.S.C.A., Sec. 717) which order reduced by $2,065,000 per annum the rates or charges for natural gas charged by petitioner to distributing companies for wholesale deliveries of gas at various city gates in Colorado.

OPINIONS BELOW.

The opinion of the Federal Power Commission will be found in R. V. 1, p. 140, and is reported in 43 P.U.R. (N. S.) 205. The opinion of the Circuit Court of Appeals will be found in R. V. 8, pp. 5066-5094 and is reported in 142 Fed. (2nd) 943.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act (52 Stat. 821; Title 15, U.S.C.A., Sec. 717(r)) and Section 240a of the Judicial Code as amended by the Act of February 1[illegible], 1925, (Title 28, U.S.C.A., Sections 346 and 347).

STATUTE INVOLVED.

The pertinent provisions of the Natural Gas Act of 1938 (52 Stat. 821; 15 U.S.C.A., Sec. 717) are set forth in Appendix A *infra*, pp. 33 to 35.

QUESTIONS PRESENTED.

1. Whether the Commission consistently with the requirements of the Fifth Amendment to the Constitution of the United States and the Natural Gas Act in fixing rates purporting to yield no more than a fair return on the cost of petitioner's property as adjusted by Commission accountants can eliminate from such cost rate base the actual cost to petitioner of certain contracts used and useful and necessary in petitioner's business, and did the Commission's action in so doing create an arbitrary and unreasonable result?

2. Whether the Fifth Amendment to the Constitution of the United States and the Natural Gas Act require a decrease in the ordered reduction of $2,065,000 in the event that Canadian River Gas Company (hereinafter called "Canadian"), in a companion case, which is filing a petition for certiorari simultaneously with the filing of this petition, obtains a reversal or modification of the Commission's order reducing its rates.

3. Whether the finding of the Commission as to the life of Canadian's reserves which form the basis for the

determination of annual depreciation expense is arbitrary, unreasonable and unsupported by substantial evidence.

4. Whether the Commission's action in fixing the annual depreciation expense on the basis of service lives proposed by the Commission's staff which prevents petitioner from recovering its investment during the economic life of the business in view of the over-all life of the whole Panhandle Field of 27 years from 1939 is an end result which confiscates petitioner's investment in violation of the Fifth Amendment to the Constitution of the United States and the Natural Gas Act.

5. Whether consistently with the requirements of the Fifth Amendment to the Constitution of the United States and the Natural Gas Act the Commission could determine reasonable rates for gas sold for resale in interstate commerce without making a separation or allocation of the property of Canadian and petitioner which, in this case, is used in making intrastate sales in Texas and interstate sale of both resale and direct sale gas, the Commission having no jurisdiction over intrastate sales or over direct sales in interstate commerce to industrial consumers.

6. Whether the Commission's substitute method of allocation of cost of service which results in burdening non-regulable gas with costs actually chargeable against regulable gas violates the Fifth Amendment to the Constitution of the United States and the Natural Gas Act.

STATEMENT.

This petition for certiorari is being filed simultaneously with a like petition by Canadian, and the two petitions are made on a joint printed record in the Circuit Court of Appeals. Accordingly, they may be said to be companion cases, and, furthermore, the Commission treated the properties of the two Companies as a unit.

The Commission's opinion and order, using what it termed a prudent investment rate base and an annual rate of 6½ per cent, found petitioner's rates unreasonable by \$2,065,000 and ordered a reduction in rates by that amount. In order to arrive at this result it was necessary to:

(1) Eliminate from consideration in the rate base the actual unamortized cost of certain contracts paid for by petitioner in stock and deprive petitioner of any annual allowance for the amortization thereof,

(2) Deny to petitioner an adequate annual accrual for depreciation, thereby making it impossible for petitioner to recover its investment by the end of the economic life of the business,

(3) Refuse to make a fair and proper allocation of petitioner's property used in the regulable part of its business which is necessary to avoid encroachment upon the non-regulable business, and

(4) Adopt a scheme of cost allocation that deprives petitioner of earnings upon its non-regulable business contrary to the expressed mandate of the Natural Gas Act and to the Fifth Amendment to the Constitution of the United States.

Historical Statement.

Canadian owns a large natural gas producing property in the Panahandle Field in Texas. It is engaged in the production of gas and transports gas through its own 22" pipe line from Bivins Station in the Field to a point near Clayton, New Mexico, a distance of some eighty-six miles. There its pipe line connects with the 22" Denver pipe line of petitioner and there the gas is delivered to petitioner. Petitioner then transmits the gas through its pipe line to points in Colorado, with the terminus near Denver, a distance of approximately 254 miles. Sales of gas are made in Colorado both to privately and publicly owned distribution systems for resale, and directly to industrial customers for consumption. All of Canadian's production, except for a relatively small quantity sold for distribution in Texas and New Mexico, is purchased by petitioner.[1]

The history of the gas field, which is of great importance

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[1]Petitioner also sells to Natural Gas Pipeline Company of America 25 per cent. of that company's requirements for its pipe line serving the Chicago area. Delivery of this gas is made in Oklahoma through leased capacity in a pipe line of Texoma Natural Gas Company, which furnishes the other 75 per cent.

in connection with the questions raised in this petition, as well as that of Canadian, will be quite fully stated in Canadian's petition. We ask the Court to consider these two petitions together, and we refer to and rely upon certain portions of Canadian's petition and brief rather than indulge in repetition.

In 1918, in the never-ending search for oil, a local Texas company, Amarillo Oil Company (hereinafter called "Amarillo Oil"), drilled a wildcat well in the Texas Panhandle Field. As happens frequently, the well came in as a gas well, and thus there was discovered what has subsequently been developed into one of the largest producing natural gas fields in the United States. The acquisition of acreage in the search for oil continued, and by 1924 Amarillo Oil owned in excess of 300,000 acres of natural gas leaseholds in the Texas Panhandle Field, which had been acquired in the first instance in the search for oil.

As would be expected, the original prices paid for these wildcat leases were nominal, reflecting the unproven character of the area. The purpose of the investment was to develop an oil field. It was not made as a project to serve the public with natural gas.[2] But since the wells drilled proved up a large gas reserve, the problem of marketing the gas had to be solved. Local markets were exceedingly small, and could have been served with one well.

Through certain corporate reorganizations Amarillo Oil had become a subsidiary of Southwestern Development Company (herein called "Southwestern"), all of the stock of which was owned by the interests which had acquired and developed the original leases and wells held by Amarillo Oil. It then undertook to find some method of marketing the gas. It had no means of its own with which to finance any long pipe line projects, and, furthermore, had had no experience with such projects, so it approached Standard Oil Company (N. J.) (hereinafter called "Standard") which had financial resources and had had considerable experience in long pipe line projects. Cities Service Company (hereinafter called "Cities Serv-

[2]This fact is important, in view of the action of the Federal Power Commission in throwing out the cost to Canadian of these leaseholds and wells and the cost to petitioner of its gas purchase contract.

ice") was also called in on the negotiations, because it owned the Public Service Company, which was then distributing manufactured gas in Denver, and controlled the Pueblo Gas and Fuel Company, then distributing manufactured gas in Pueblo. A franchise to distribute natural gas had to be obtained in Denver to make the project feasible, and, furthermore, the two distributing plants, in Denver and Pueblo, had to be converted into plants capable of distributing natural gas at higher uniform pressures than had been required for the manufactured gas. Neither of these three parties had any interest in either of the others. (R. V. 1, pp. 613, 622.) *They dealt at arm's length.* Southwestern was perfectly free to put its gas leaseholds and wells into the project and sell gas at cost or not, and, if it did, to insist upon its price being paid. Standard was free to finance the project or not, depending upon whether satisfactory terms could be agreed upon. Cities Service was free to say that its subsidiary distributing companies would go to the expense of converting their distribution systems to natural gas, and to enlarge these systems to take care of the contemplated increased use of natural gas for house heating, or to continue to distribute manufactured gas. These three parties finally, and after long negotiations as to the means of carrying out the project, entered into an agreement entitled "Memorandum of stipulations agreed upon between Southwestern Development Company, Cities Service Company and Standard Oil Company (New Jersey)". (Exhibit 1, R. V. 1, p. 381), which was signed April 5, 1927, conditioned upon the granting of a natural gas franchise to the Public Service Company in Denver, and the fixing of rates to be charged by Public Service Company on such basis as would make the project feasible. (R. V. 1, p. 394.)

Cost to Petitioner of Certain Contracts.

It was agreed that in order to carry out the project Southwestern would form and own what they then referred to as the "Texas Producing Company" (Canadian), and would cause its wholly owned subsidiary, Amarillo Oil, which then had the title to the leaseholds, gas wells and equipment, (R. V. 1, p. 381) to convey these properties to Canadian for a consideration of $5,000,000 (R. V. 8, p. 5069). Southwestern

was to form what they called the "Texas Connecting Company" for the purpose of making deliveries of gas for the project (R. V. 1, p. 383); however, one company to perform the functions of both the producing company and the connecting company could be formed (R. V. 1, p. 401), and that is what actually happened in the formation of Canadian. This project Agreement provided that these gas leaseholds and wells, except for certain intrastate sales in Texas, would be reserved for the Denver line project and that no contract for the sale of natural gas would be made nor anything done that might impair the capacity to fulfill the deliveries of natural gas thereunder for the full term of the Gas Purchase Agreement to be made. (R. V. 1, p. 384).

It was agreed that Standard, in order to carry out the project, was to form a company, designated in the agreement the Colorado Company, which later became your petitioner, Colorado Interstate Gas Company (R. V. 1, p. 385; V. 2, pp. 625-641), and your petitioner was to construct a pipe line from the point of connection with Canadian's line, at a point near Clayton, New Mexico, to Denver via the city gates of Pueblo and Colorado Springs. It was agreed that Canadian, under a contract for the full term of the project, would sell gas to petitioner on a cost basis in consideration for which petitioner was to issue part of its preferred and common stock. Petitioner was to sell such gas to Public Service Company under a definitive contract to be made in accordance with the terms already agreed upon. Similar sales contracts were to be made by petitioner with Pueblo Gas and Fuel Company and with Colorado Springs, if the Public Service Company could buy the distributing system at that place. (R. V. 1, p. 387.) In addition, it was agreed that petitioner was to sell gas directly to Colorado Fuel and Iron Company, which was a necessary prerequisite to make the project economically feasible (R. V. 1, pp. 493, 519), and a few other industrial customers under interruptible contracts, for industrial use, subject to the prior demands of the domestic consumers. (R. V. 1, pp. 390, 391.)

Cities Service was to cause its subsidiary distributing companies to convert the systems used to distribute manufactured gas into systems to distribute natural gas, and to make such additions and changes in the distribution plants

which would be required for the contemplated increased use of gas for house heating as well as for domestic purposes. (R. V. 1, p. 390.) It also agreed to furnish engineering and commercial advice in connection with the project.

Standard agreed to purchase a portion of the common and preferred stock of petitioner, and also to advance to petitioner cash with which it in turn could purchase for cash the bonds of Canadian.[3] (R. V. 1, pp. 394-398.) Standard organized the Colorado Company and purchased for cash 531,250 shares (42½% of the total) of its common stock for $1,000,000, and 10,000 shares (50%) of its $100 par value 6% preferred stock, for which it paid $1,000,000 in cash (R. V. 2, pp. 626-630). As agreed upon in the project Agreement, there was issued simultaneously by petitioner to Southwestern, as the nominee of Canadian in consideration of Canadian's execution and delivery of its contract to produce, gather, transport and sell gas to the project at cost, 531,250 shares (42½%) of petitioner's common, and 10,000 shares (50%) of its preferred stock (R. V. 2, pp. 627-629), which was recorded and charged on the books of petitioner in the total amount of Two Million Dollars, being exactly the amount simultaneously received by petitioner for the sale of a like amount of stock to Standard for cash. (R. V. 2, p. 627; V. 3, pp. 1439-1440.)

Also as agreed there was issued simultaneously to Cities Service for causing its subsidiaries to change over to the distribution of natural gas, and for the other considerations stated above, 187,500 shares (15%) of petitioner's common stock (R. V. 2, pp. 628, 629; V. 3, pp. 1439, 1440), which was likewise recorded on petitioner's books at $352,941.17, being on the same basis as the stock sold for cash to Standard (R. V. 2, p. 628).

Petitioner contended that in any determination of original cost the unamortized portion of the cost of these contracts paid for in stock issued to Southwestern and Cities Service should be included, but the Commission denied such contention and refused to include in original cost or prudent investment any of such costs. At the time of the hearing,

[3]As finally financed, Standard bought substantially all of petitioner's bonds, as well as the portion of common and preferred stock referred to next. (R. V. 1, p. 496.)

the unamortized portion of such cost (and that was all the petitioner contended should be included) was $1,000,000. (R. V. 3, p. 1749.)

There was no disagreement in the evidence that the costs charged on the books for the stock payments to Southwestern and Cities Service were on the same basis as the cash simultaneously paid by Standard for a like amount of stock. (R. V. 3, p. 1440.) The Commission witness agreed that this was the best evidence as to the value of the stock at that time. (R. V. 3, p. 1437.) He also agreed that the transaction was the same as if cash in these amounts had been paid for the contracts and then stock had been purchased with that cash.[4] (R. V. 3, pp. 1443-1444.)

There was no evidence whatsoever that the payments for these contracts were excessive, or that the consideration received was inadequate. Neither was there any evidence, nor could there be any evidence, that the agreement for Canadian to sell the gas at cost, was of any less value than the payment made therefor. Neither was there any evidence that the undertakings on the part of Cities Service for its part in the launching of the project was of less value than the stock paid therefor. Notwithstanding these facts which were not disputed by the Commission (R. V. 1, pp. 152-154) and which the Court stated in substance (R. V. 8, p. 5082), the Commission and the Court wholly disallowed these items as an "unjustified and fictitious increase of book cost of plant" (R. V. 1, p. 153; V. 8, p. 5082).

Reduction in Cost of Gas.

A part of the reduction of $2,065,000 per year ordered by the Commission as against your petitioner is based upon a reduction ordered in the Canadian case in the price of gas sold by Canadian to petitioner in the amount of $551,000 per annum. In the companion case involving Canadian, it is contended that the Commission and the Court erred in ordering and approving this reduction in the cost of gas, and should Canadian be sustained in its contention that this

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[4]The Commission did allow as part of original cost or prudent investment the unamortized portion of the cost of a contract for the sale of gas at the city gate at Colorado Springs in the amount of $118,061 paid in cash. (R. V. 2, p. 1127.)

reduction of $551,000 should not have been ordered, in whole or in part, then it would necessarily follow that the $2,065,000 reduction should be reduced accordingly, and this is a very special reason why, as already indicated, the two petitions for certiorari should be considered together.

Annual Depreciation Expense.

Annual depreciation expense was determined on the service life formula. (R. V. 1, p. 160.) The Commission's engineer testified as to the service lives of the various items of property. He assigned a 50 year life to the main pipe line; a 48 year life for most of the structures; a 36 year life for the compressors, and shorter lives for the other items of property entering into the plant. In determining the service lives he stated it was necessary to take into account the life of the field, or the economic life of the project, and he testified that it was necessary to indulge the assumption that the company could continue in business and use the plant not only up to the end of the 50 year life which he had assigned to the main line, but also for a period of six to ten years beyond. The 50 year life would expire in 1978, and accordingly his assumption was that the economic life of the field will extend until 1984 or until 1988. This was based upon the testimony of Commission staff witnesses which the Commission actually did not accept. The reason for assuming that the economic life of the field would be six to ten years longer than the 50 year period assigned as the life of the main pipe line was, as he stated, in order that necessary additions to the plant and property made in the latter part of the service lives could be recovered by depreciation allowance over such additional period of time. (R. V. 3, p. 1760.)

In the companion case Canadian makes the contention that the finding of the Commission as to the remaining life of its recoverable reserves is not supported by any substantial evidence, and that the true life of its recoverable reserves is much shorter than that found by the Commission, and must be based on the economic life of the Panhandle Field as a whole, not on Canadian acreage solely. The life of the entire Panhandle Field, on the basis of the Commission witness's estimate of recoverable reserves adjusted to a fifty

pound abandonment pressure and divided by the estimated annual production from the field as a whole, does not exceed twenty-seven years from December 31, 1939, (R. V. 1, p. 157; V. 7, p. 3701; V. 8, pp. 4638-46). Petitioner makes the same contention and if it be sustained then the necessary result is that the petitioner will be unable to recover its investment during the true economic life of petitioner's business. The Commission recognized that the life of the enterprise must be longer than the service life of any major unit of property. Thirty-eight years from 1939 was assigned to main line pipe so that a twenty-seven year life under the Commission's own theory will not permit a recovery of petitioner's investment (R. V. 1, pp. 159-161).

Allocation of Property Between Regulable and Non-regulable Business.

Only a portion of the gas sold by petitioner is subject to the jurisdiction of the Commission. All gas sold direct to industrial customers is free from price regulation. Gas sold in intrastate commerce by Canadian is also free from regulation. This situation requires a determination of costs properly chargeable against the regulable sales. The Commission acknowledged this duty (R. V. 1, pp. 174-177).

The Commission witness and the Commission itself admitted that no separation or allocation of the property was made as between interstate and intrastate business, nor as between resale gas subject to the Commission's jurisdiction and direct sale industrial gas not subject to the Commission's jurisdiction (R. V. 1, p. 175). The Commission found that this was not necessary, and substituted what it called allocation of cost of service, which took into account the cost of operation, as determined by it, plus a return, as determined by it.

The Commission's Allocation of Costs.

Where, as here, all sales are not subject to Commission jurisdiction, if the method of allocation used unfairly burdens the gas unregulated, sold to industrial customers for consumption, then the result of the Commission's action is to take from petitioner the earnings of its unregulated

business, contrary to the intent of the Natural Gas Act, and give them to the customers who purchase gas for resale. This results in confiscation and, in fact, follows from the so-called allocation used by the Commission in this case. The Commission did not discuss the details of its allocation and we must examine the testimony for enlightenment as to the basis of the allocation followed by the Commission (R. V. 1, pp. 175-176).

In making the allocation the Commission treated the properties of Canadian and petitioner as a unit, combining costs and operations. The accounting witnesses for the Commission made adjustments by way of deduction in the original cost and adjusted downward each company's operating expenses. Then another accounting witness consolidated all of the revised accounts of the two companies, as if the two companies were one, reflecting in such consolidated figures all of the adjustments theretofore made with respect to each company separately. (R. V. 4, pp. 2215-2259.) This was set up as Exhibit 185. (R. V. 4, pp. 2215-2244.)

The engineering witness then took this Exhibit 185 which showed the combined gross income of the two companies, with the amount paid by petitioner to Canadian for gas under the contract eliminated. (R. V. 4, p. 2246.) This combined gross income included the income received by Canadian from its intrastate sales in Texas (R. V. 4, p. 2249), and it included the income from all direct sale industrial or unregulated business of both companies. (R. V. 4, p. 2229.)

This engineering witness admittedly made no separation either as between the property devoted to intrastate and that devoted to interstate business, or as between that used in selling gas for resale and that used for direct sales not subject to regulation. (R. V. 4, pp. 2317-2373.) He gave no consideration to the fact that resale gas had priority over direct sales to industrial customers, and that the system had been built and maintained on that basis. (R. V. 4, pp. 2390-2397.) He admitted that the load factor of gas delivered into the Denver line and into the Chicago line of Natural Gas Pipeline Company of America was of conse-

quence in determining cost, and that the load factor on the Chicago line was 95%, whereas it was somewhere between 60% and 70% on the Denver line. Nevertheless, he gave no consideration whatever to the load factor. (R. V. 4, pp. 2390, 2391; V. 5, pp. 2414, 2415.)

In allocating his transmission costs the witness treated as a unit, and as if it were one common conduit used by all gas, all the transmission system, beginning with and including:

(1) Canadian's Bivins Compressor Station in the field and its transmission line from that point in Texas,

(2) All laterals used in making intrastate deliveries in Texas, whether direct sale industrial gas or sales of gas to Texas distributing companies, and

(3) All of petitioner's transmission line to Denver with all of its laterals, even though some laterals were used exclusively in delivering direct sales gas to industrial customers. This complete transmission system, consisting of four compressor stations and 340 miles of pipe lines, was treated as a unit or one conduit.

The witness discussed the Commission's flow map reproduced as Appendix B (R. V. 2, p. 1079), in reference to which it appeared that of the 21,594,112 Mcf of gas which passed through the Bivins station in 1939, 7,257,379 Mcf were sold directly to Colorado Fuel and Iron Company at Pueblo as a direct sale, not subject to regulation, and that this gas made no use whatever of his assumed unit or common transmission system from Pueblo to Denver, a distance of 105 miles. It also appeared from the flow map that 1,676,091 Mcf for the same year constituted direct sales to the Colorado Portland Cement Company, slightly north of Pueblo, and that the 20-inch pipe line from Pueblo to Denver, in contrast to the 22-inch pipe line south of Pueblo, was used almost exclusively by the resale or regulated gas. The witness admitted that in computing his "volumetric cost" component of his total transmission cost he gave no consideration to such facts, and admitted, of course, that consideration of such facts would produce a different result. In transmission costs, a large factor is

the number of times the gas is compressed at the several compressor stations. In deriving his cost he gave no consideration to the number of times the gas had to be compressed before it was delivered to the respective customers. (R. V. 4, pp. 2396-2399.) He admitted that for every thousand cubic feet taken from the line the volumetric factor of three cents plus was applied, whether the gas left the line at Dalhart, Texas, only a few miles from the field, or whether it was transmitted all the way to Denver (R. V. 5, p. 2425). He also admitted that although gas going to Denver is compressed four times he did not allow any greater expense than for the gas leaving the line after one compression only. (R. V. 5, p. 2448.) He gave no consideration to the fact that the industrial customers had a shut off provision in each of those contracts, nor did he give any consideration to the numerous shut offs that had been made in the course of the company's experience. (R. V. 5, p. 2439.) He gave no consideration to the relative or prior use of the line which the regulated business might demand over the unregulated on the coldest day expected, but merely took deliveries of regulated and unregulated gas as they happened to occur on February 9, 1939, which he called the system's peak delivery day for that particular winter. (R. V. 5, pp. 2434-2436; V. 4, p. 2319.) In making his division of all costs he treated all of the gas as if it entered the transmission system or common conduit at Bivins, and as if such gas used or was transmitted through every part of such unit transmission system, and all came out at one common vent at Denver. (R. V. 5, pp. 2422-2448; V. 4, pp. 2317-2373.)

After deriving such allocated cost in the manner indicated, he then compared these allocated costs with the actual revenues received in 1939 from each customer, including both regulated and unregulated sales, substracted one from the other, and thus derived the amount of the recommended reduction.

This, in brief, was the testimony, and the only testimony, upon which the Commission attempted any allocation at all, and by this method the Commission arrived at the ordered reduction in rates. This method departed from

the requirements of the decisions of this Court, saying emphatically that there is a jurisdictional necessity for an allocation or separation of *property* which is jointly used in interstate and intrastate commerce, and this jurisdictional necessity is just as apparent where property is jointly used for resale gas (subject to regulation) and direct sale gas (not subject to regulation).

Petitioner put in full and complete testimony showing the correct allocation of petitioner's property between that used in carrying on the regulated business and that used in selling gas to industries for consumption. This was completely disregarded by the Commission (R. V. 1, p. 175).

REASONS FOR GRANTING THE WRIT.

1. The Circuit Court of Appeals has decided Federal questions under the Natural Gas Act in a way probably in conflict with applicable decisions of this Court.

2. The Circuit Court of Appeals has decided important questions of Federal law arising under the Natural Gas Act which have not but should be settled by this Court.

3. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.

CONCLUSION.

For these reasons, stated more fully in the attached brief, it is respectfully submitted that the writ should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS BELOW.

Reference to the opinion of the Commission and of the Circuit Court of Appeals is made in the petition, page 2.

II.

JURISDICTION.

The statutory provisions under which the jurisdiction of this Court is invoked are shown in the petition, page 2.

III.

STATEMENT OF THE CASE.

This appears in the petition, pages 3 to 15.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

Errors to be urged are those specified in the petition, pages 2 and 3, under the heading "Questions Presented".

V.

ARGUMENT.

1. **The order of the Commission, sustained by the Circuit Court of Appeals, which was based upon a purported finding of the Commission as to the original cost of petitioner's property, or its prudent investment therein, cannot possibly result in just and reasonable rates when a portion of such cost (in this case $1,000,000) was eliminated, and the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court, and particularly is in conflict with Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591. (No. 1** of Questions Presented, p. 2, Statement pp. 4 to 9.)

The evidence relating to the project agreement of April 5, 1927, between Southwestern, Standard and Cities Service will be found in Volume 1 of the Record at pages 381 to 596.

The evidence as to the performance under said agreement will be found in Volume 2 at pages 626 to 641, and in Volume 3 at pages 1439 and 1440, and the evidence as to the elimination of the $1,000,000 from original cost will be found in Volume 2 at page 1140 and Volume 3 at pages 1429 to 1451.

The facts are sufficiently set forth in the Statement in the petition.

The value of the contracts in question seems evident. It requires no argument to demonstrate the enormous value to petitioner of having these gas leaseholds, wells and other facilities of Canadian, obligated to produce, gather, transport and sell gas to petitioner on a preferred basis at cost for a period of twenty years and thereafter so long as petitioner shall elect. The issuance of stock by the petitioner to Southwestern was pursuant to the April 5, 1927, agreement and was the consideration expressly provided for Southwestern's agreement that it or its subsidiary (1) would hold in reserve and drill and develop the natural gas acreage in the Panhandle Field of Texas then held by Southwestern's subsidiary (Amarillo Oil) under leases or in fee; (2) to supply such gas to petitioner for the Denver project with priority over all other demands except certain intrastate sales in Texas, for which Southwestern or its subsidiary (Amarillo Oil) was already committed; and (3) to sell gas to petitioner during the whole project period at cost. (R. V. 1, p. 384.)

Neither does it require any argument to show the great value to petitioner of the rights obtained from the contract with Cities Service for the common stock issued to it. Cities Service agreed (1) to contribute its engineering and commercial experience, advice and aid to the project; (2) to cause its subsidiary distributing companies at Denver and Pueblo, respectively, to execute firm gate rate contracts for the full project term; (3) to cause such distributing companies without expense to petitioner to make the necessary changes and extensions in their distribution systems to take care of the anticipated increased sales of natural gas, particularly for house heating purposes; and (4) to convert, also without expense to petitioner, such distribution systems into systems tight enough to distribute the drier natural gas

at higher uniform pressures. (R. V. 1, pp. 387-392, 541-542, 590, 594-596.)

Why, then, did the Commission disallow the unamortized portion of the cost of these contracts, which the evidence showed was, at the time of the hearing, $1,000,000? The Commission, after referring to the tripartite agreement of the project parties, said:

> "Very strangely, it is now represented that Canadian Company refused to negotiate an agreement for the sale of gas by it to Colorado Company unless Colorado Company turned over to it 10,000 shares of preferred stock, having a total par value of $1,000,000, and 531,250 shares of no par common stock having a recorded value of $1,000,000."
> R. V. 1, p. 153.

Then the Commission observed that this transaction "resulted in an unjustified and fictitious increase of book cost of plant." (R. V. 1, p. 153.)

Of course Canadian, after being organized to carry out the obligations assumed by Southwestern in the project agreement, *would refuse to proceed except upon the basis specified in the tripartite agreement.* It was bound to see to it that the common and preferred stock was issued to its parent company, Southwestern, contemporaneously with its execution of the gas purchase agreement with petitioner. What has that to do with the failure of the Commission to include this item in original cost? Why did the Commission use the words, "Very strangely", just as if this transaction between petitioner and Canadian was the original and only transaction involving the issuance of such stock? That confusion found its way also into the opinion of the Court. The Court did not question the value of these contracts or that they were essential to and used and useful in the enterprise, and did not find that the amount paid was excessive. The Court misses the point and avoids the issue, just as did the Commission with this statement:

> "* * * But, according to the records of Colorado, Canadian refused to enter into the contract for the sale of gas to Colorado, and Cities Service refused to direct or permit its subsidiaries to enter into the

contracts for the purchase of gas from Colorado; and thereupon Colorado issued to Southwestern as the nominee of Canadian 10,000 shares of preferred and 531,250 shares of common stock, and issued to Cities Service 187,500 shares of common stock. * * *." (R. V. 8, p. 5082.)

The Court thus characterized this transaction involving the issuance of this stock:

"* * * The record offers little or no explanation of the refusal to enter into the contracts as provided with binding effect in the Memorandum of Stipulation, or of the failure of Colorado to exact that they be entered into *without additional consideration or inducement*. * * *." (R. V. 8, p. 5082.)

It is utterly inconceivable how the Court could make this statement. The Court refers to *additional* consideration. This was not additional consideration; it was *the* consideration specified in the original contract before petitioner or Canadian had been born. Undoubtedly the Court was under the impression that petitioner issued the required amount of stock to Southwestern and Cities Service as provided in the original agreement, and then later issued additional stock, in like amounts, because Canadian, although obligated by the contract of its parent, became recalcitrant and demanded that it be paid again what had already been paid pursuant to the agreement made with its parent on April 5, 1927. The same observations might be made with respect to Cities Service.

There has never been any question as to the propriety, and, indeed, as to the necessity, when the determination of the cost of the property was undertaken, of including the cost of contracts which are used and useful in the business. *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264; *Duluth Street Ry. Co. v. Railroad & Warehouse Commission*, 4 Fed. (2d) 543 (affirmed 273 U. S. 625); *Bonbright v. Geary*, 210 Fed. 44; *Valparaiso Lighting Co. v. Public Service Commission*, 129 N. E. 13; *Pacific Gas & Electric Co. v. City and County of San Francisco*, 265 U. S. 403.

This well settled rule of law is recognized by the Com-

mission itself by including in original cost the cost of the Colorado Springs contract (R. V. 1, p. 152), the contract purchased by petitioner from Arthur K. Lee, which provided for the sale of gas to Colorado Springs. The unamortized portion of that contract which the Commission allowed in the rate base was $118,061. That contract was not different in kind from the contracts with Southwestern and Cities Service.

This elimination from the purported original cost or prudent investment, without any reason whatsoever, does not square with the doctrine of *Federal Power Commission v. Hope Natural Gas Co., supra.* A rate cannot possibly be just and reasonable in its consequences, or, to put it another way, it is inevitable that it must be unjust and unreasonable in its consequences when it is based upon a purported finding of original cost, and a Commission fixed return thereon, if any portion of that cost is eliminated. One million dollars cannot be eliminated under such circumstances any more than one-half or two-thirds of such cost should be eliminated. This elimination from original cost actually deprives petitioner of the right to recover through amortization the sum of $1,000,000, which represents a valid cost incurred by it in setting up the project. Likewise it deprives petitioner of a 6½% return on the sum of $1,000,000 during the first year, and on the remaining unamortized amount year by year. This result cannot be said to be an inconsequential rate impact.

This sort of thing does not involve "a formula," but the impact of the rate order. The total effect of such a rate order cannot be said to be just or reasonable, but must be said to be unjust and unreasonable under such circumstances. Accordingly, we contend that the Circuit Court of Appeals has decided questions of Federal law in a way probably in conflict with applicable decisions of this Court, particularly *Federal Power Commission v. Hope Natural Gas Co., supra.*

2. The Commission in the companion case, as shown in Canadian's petition for certiorari, reduced the cost of gas sold to petitioner by Canadian under the contract in the amount of $551,000 per year. Any modification of this reduction must result in a corresponding reduction in the $2,065,000 annual

reduction ordered in petitioner's rates. (No. 2 of Questions Presented, page 2. Statement, pages 9 and 10.)

This petitioner merely refers to this situation as a reason why the two petitions should be considered together, and in order to protect itself in the event Canadian's petition should be granted and the decision of the Circuit Court of Appeals reversed in whole or in part because of the erroneous reduction in the cost of gas.

3. The order of the Commission, sustained by the Court, does not allow sufficient annual depreciation to enable petitioner to recover its investment within the life of the project. (Nos. 3 and 4 of Questions Presented, pages 2 and 3, Statement, pages 10 and 11.)

Here the situation is disclosed in our Statement contained in the petition, and the order in this regard is contrary to clear implications of *Federal Power Commission v. Natural Gas Pipeline Company of America,* 315 U. S. 575, to the effect that there is no constitutional requirement "that the owner who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it." This clearly implies, and other decisions of this Court hold, that in such situation petitioner should have the right, so far as regulation is concerned, to receive at the end of the life what it did actually put into it.

In the companion case Canadian makes the contention that there was no substantial evidence to support the finding of the Commission that the remaining life of its gas reserves would be 53 years from 1939, and that the true life is much shorter. Canadian's petition shows that the life of the whole Panhandle Field is the limiting factor, which is no more than twenty-seven years from 1939. (R. V. 7, p. 3701; V. 8, pp. 4638-46.) Reference to that part of Canadian's petition hereby is made and upon the reasons therein stated petitioner relies in order to avoid repetition. If that contention be sustained, it necessarily follows that petitioner will not be able to recover its investment, since the Commission based its findings on an assumed life of fifty-three years which gave a margin of fifteen years beyond the service life of pipe. (R. V. 1, p. 159.)

The annual depreciation, as fixed by the Commission on such basis, is not sufficient in any event to cover the cost of replacements which will have to be made in the interim. For example: While the service life of the main pipe line was determined to be 50 years, replacements of important items of plant, such as compressors, with a service life of 36 years, are clearly not taken care of. The compressor that is replaced at the end of 36 years would be used and useful only for 14 more years, and the company would be able to get a return of that investment of only 14/36ths of its cost. This is perfectly obvious. The same is true of all other short lived items of plant which have to be replaced in the 50-year period.

Considering the hazardous character of any natural gas production and the uncertainty as to the life of gas reserves for a period of fifty-three more years, the Commission's action in postponing the possibility of recovery by petitioner of its investment for such a long time in the future is unreasonable and arbitrary. If an adequate annual allowance for depreciation is not now allowed petitioner, it may turn out that it will be impossible to recover its full investment.

4. The Commission could not possibly determine reasonable rates, consistently with the Fifth Amendment to the Constitution of the United States, for gas sold for resale in interstate commerce without making a separation or allocation of the property, some of which is used solely for the sale of gas not subject to the Commission's jurisdiction, and the remaining amount is used jointly for making intrastate sales in Texas and interstate sales for both resale and direct sale gas. It made no such allocation or separation, and its "allocation of cost of service" is not a valid substitute, and even if valid in principle, reasonable rates could not be determined because of the various errors in its application. (Nos. 5 and 6 of Questions Presented, page 3: Statement, pages 11 to 15.)

Petitioner is engaged in the sale of gas to utility companies for resale, which is subject to the Commission's jurisdiction and which is referred to as "resale gas". It also sells natural gas directly to industries for consumption, which sales are not subject to the Commission's jurisdiction,

and which are referred to as "direct sale gas". The Commission and the Court recognized in this case the necessity of making some sort of allocation as between resale gas and direct sale gas, and, of course, not to do so would arbitrarily extend the Commission's jurisdiction to transactions completely exempted by Congress. The Commission has recognized this duty in other cases. In *Re Interstate Natural Gas Co., Inc.*, 48 P.U.R. (N.S.) 267, at page 279, the Commission said:

> "Interstate's properties are used in transactions over which we have jurisdiction, as well as those beyond our jurisdiction, and they are also used to render service to customers with varying load and other characteristics. Its operating expenses likewise relate to these several phases of the company's operations. This gives rise to joint costs. It, therefore, becomes necessary to resort to allocations for the purpose of determining just and reasonable rates of the business subject to regulation under the Natural Gas Act and also for the purpose of determining the proper disposition of any rate reduction which we may order."

The Commission took the same position in *Re Cities Service Gas Co.*, 50 P.U.R. (N.S.) 65, 89.

(a) The decisions of this Court require a separation of property, which the Commission admitted it did not make, and the approval of its action by the Circuit Court of Appeals was erroneous.

The Commission itself admitted that it made no separation of property. It said:

> "The Commission is aware that in an investigation such as this it is incumbent on it to determine the reasonableness or unreasonableness of the rates and charges subject to its jurisdiction. * * *.
>
> "It does not follow, from this obligation of the Commission, that an allocation of physical property or portions thereon, must be made, before any excessive returns are determined, as seems to be the contention of the companies. * * *."

(R. V. 1, pp. 174, 175.)

The Commission treated the properties of Petitioner and Canadian as a composite system.

As pointed out in the Statement of the Case contained in the petition, gas is produced by Canadian in the Panhandle Field of Texas, and it transports and sells off of its main line gas in intrastate commerce in Texas. The gas transported in interstate commerce to Colorado is of two classes: (1) gas transported as far as Pueblo, Colorado, and sold directly to industrial consumers, and (2) gas transported and sold for resale to distributing companies; one in the Arkansas Valley, one at Pueblo, one at Colorado Springs and one at Denver. Some of the "composite system" facilities are used in part for the transportation and sale of (1) intrastate sales in Texas; (2) interstate sales for resale, and (3) interstate direct sales. Other facilities are used exclusively for direct sale gas and for resale gas. This being the case, it necessarily follows from a simple application of common sense that a separation of the property, based upon the use which is made of it, is necessary in order to determine the reasonable rates for the sale of gas for resale in interstate commerce, which is the extent and limit of the Commission's jurisdiction. Such necessity is a matter of jurisdictional limitation imposed both by the Constitution and the statute. It was incumbent upon the Commission, in order not to transcend its jurisdiction, to draw and observe two jurisdictional boundaries: First, the boundary line between intrastate and interstate commerce, and, second, the boundary between sales for resale and direct sales. The Commission is circumscribed by each of these boundaries, and so it has been expressly held by this Court. In *Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133, where intrastate rates were involved in a state commission order, and where some of the property was used in common for intrastate and interstate business, this Court said (pp. 147, 149):

> "At the threshold of the discussion, we are met with the fact that, in these findings, the commission and the court made no distinction between the intrastate and the interstate property and business of the company. It appears that the property of the company in Chicago is used to render (1) what is called exchange service, all of which is intrastate, (2) intra-

state toll service over its own lines and under arrangements with companies other than the American Company, and (3) interstate toll service, which includes all the toll service rendered under arrangements with the American Company. The company introduced evidence separating the intrastate and interstate business and also the intrastate exchange business. While the court regarded these computations as correct, and approved the method in which they had been made, still the court made no specific findings based on a separation of the intrastate and interstate property, revenues and expenses, but determined the issue on the basis of the total Chicago property of the company.

* * * * *

"The separation of the intrastate and interstate property, revenues and expenses of the company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation. * * * The proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction, and this can not be accomplished unless there are findings of fact underlying the conclusions reached with respect to the exercise of each authority. In view of the questions presented in this case, *the validity of the order of the state commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business* and of the compensation receivable for the intrastate service under the rates prescribed. * * * As to the value of that property, and as to the revenue and expenses incident to that business, *separately considered;* there should be specific findings. Railroad Commission v. Maxcy, 281 U. S. 82, 83, 74 L. Ed. 717, 718, 50 S. Ct. 228." (Emphasis supplied)

The same rule was announced in the *Minnesota Rate Cases,* 230 U. S. 352, 435, 57 L. Ed. 1151, 1556, in the following language:

"Where the business of the carrier is both inter-

state and intrastate, the question whether a scheme of maximum rates fixed by the state for intrastate transportation affords a fair return *must be determined by considering separately the value of the property employed in the intrastate business* and the compensation allowed in that business under the rates prescribed. This was also ruled in the Smyth Case (id. p. 541). The reason, as there stated, is that the state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business." (Emphasis supplied)

This opinion also most emphatically rejects the notion that this required separation of property or separation of capital items can be substituted for by any formula based merely on revenue and expenses, or cost accounting, or particularly, as in that case, revenue; a thing akin to what the Commission attempted to employ in this case. The fallacy of this attempted substitute, of course, lies in the fact that such a process involves circuitous and inconclusive reasoning or argument, or is just another illustration of the dog chasing his tail. The Supreme Court in this Minnesota Rate Case continued by saying with respect to this method:

"When rates are in controversy, it would seem to be necessary to find a *basis for a division of the total value of the property* independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business that *proportion of the total value of the property* which will correspond to the extent of its employment in that business. * * *." (Emphasis supplied)

See also:

Wabash Valley Electric Company v. Ralph M. Young, et al., 287 U. S. 488, 493, 77 L. Ed. 447, 451.

Accordingly, we have here as a ground for invoking this Court by certiorari, that the decision of the Circuit Court of Appeals approving what the Commission did, and sustaining its order based thereon, is probably in conflict with applicable decisions of this Court.

Incidentally, neither the Commission nor the Court in adopting this "allocation of cost of service" as a substitute for the separation or allocation of property, undertook to distinguish the decisions of this Court above cited, nor did either cite a single authority in support of the position taken.

(b) Even if the Commission's "allocation of cost of service" is a valid substitute for the separation of the property itself and could be approved, which we deny, no end result formula, such as approved in the Hope Case, can possibly cloak the flagrant errors in its application to our case.

The Commission's testimony respecting its so-called "allocation of cost" will be found in Volume 4 of the Record at pages 2215-2259, 2317-2399, and in Volume 5 at pages 2400-2448.

The method used by the Commission's witness has been explained in the Statement in the petition, pages 11 to 15. Such method clearly results in unfairly and arbitrarily assessing costs against non-regulable gas which should be borne by regulable gas.

To approve the result arrived at by such method completely ignores the restriction against fixing rates for sales of gas to industrial customers for consumption.

He admitted that in determining his "capacity cost", a component of his total transmission cost, he ignored peak load demands for domestic gas that would occur on the coldest expected days in Denver (for which the plant was designed), and that he arbitrarily took the deliveries

of regulated and unregulated gas as they happened to occur on February 9, 1939, which he called the "system peak day" for that particular year. The costs so determined he finally compared with the revenue derived from each of petitioner's customers.

It does not take any argument to show that there is something wrong about charging to the intrastate deliveries at Dalhart, Texas, a distance of 45 miles from the end of the gathering system, the same volumetric cost as is charged at Denver, a distance of 340 miles from such point. Neither does it take any argument to show that when the line from Pueblo to Denver is thrown into a common pot, the cost exclusively attributable to that line immediately becomes, in large part, attributed to the Colorado Fuel and Iron Company at Pueblo and other direct sale customers, and in part attributed to intrastate customers in Texas. This method decreases the cost which should be charged against the resale gas in Colorado, and makes it appear that the company is earning from its resale customers in Colorado more than it really is. It frees the resale gas from its proper share of the costs and thus burdens the direct sale gas.

No reasonable rate can be determined on the basis of an allocation of the cost of service, even if that be a valid substitute for the separation or allocation of the property itself, when priority of service as between resale domestic and direct sale industrial gas is ignored, when the system was designed and built to take care of the domestic customers on the coldest day to be expected, and when each of the contracts for direct sales expressly provided that the supply of gas might be interrupted at any time in order to take care of the domestic demand, and when, as the evidence shows, there had been many interruptions of the direct sale gas over a 10-year period of petitioner's experience.

The Company's evidence on the allocation of its property as between the direct sale gas and the resale gas is found in the record as follows: R. V. 2, pp. 1108-1118; V. 4, pp. 2264-2307. All of this testimony was completely disregarded by the Commission. (R. V. 1, p. 175.) The Court

passed over the point by stating as follows: "It may be conceded, without deciding, that the method is not free from defects or imperfections in all its aspects. But even so it cannot be said that as the consequence the impact of the orders of reduction, each in its totality, produces arbitrary results or oversteps the bounds of due process." (R. V. 8, p. 5088.) The action of the Court has resulted in no judicial inquiry into the action of the Commission in overstepping its statutory jurisdiction. Unless that inquiry is made, there is no manner in which the Commission can be held within the ambit of its statutory authority.

In addition to our contention above stated, that as a matter of jurisdictional necessity there should have been a separation or allocation of the property, and that the order of the Commission in this connection as approved by the Circuit Court of Appeals is probably in conflict with the decisions of this Court above cited, we have also, in connection with this point, the proposition that here is an important Federal question which has not yet been, but should be, settled by this Court. There have been several investigations and orders under the Natural Gas Act. At least one other case is now pending in the Circuit Court of Appeals in this Circuit. One has recently been decided in the Eighth Circuit, entitled *Panhandle Eastern Pipeline Co., et al., v. Federal Power Commission.* The opinion was handed down June 6, 1944, (not yet officially reported, but may be found in 54 P.U.R. (N.S.) 26) and we are advised that petition for certiorari has been or will be filed in this Court in due course. In that case, the Commission made no allocation of any kind as between "resale gas" and "direct sale gas" saying that it was not necessary because the direct sale gas was inconsequential. The Court affirmed, but there was a dissenting opinion by Circuit Judge Riddick, saying: "Here the Commission has admittedly refused to observe the limit upon its jurisdiction fixed by Congress."

The only two rate cases under the Natural Gas Act heretofore before this Court, the *Natural Gas Pipeline Case* and the *Hope Case, supra,* did not involve this question of allocation at all. Undoubtedly there will be other cases under the Natural Gas Act before the Federal Power Com-

mission involving this principle of allocation, and it is important that this novel allocation of costs of service should be explored and the question properly decided for future guidance. Not to have this question properly decided will permit the Federal Power Commission indirectly to draw to itself full control over the rates of gas sold to direct industrial customers in competition with other fuels, and permit siphoning off profits from direct sale gas to the credit of resale gas. If this is permitted, then any limitation imposed by Congress becomes a farcical and useless endeavor. The Court, in merely stating what the Commission had to say on this subject of allocation, and then approving it, notwithstanding the decisions of this Court above cited and notwithstanding the gross and flagrant errors in the application of the Commission's substitute method, has, in effect, denied to petitioner its right of judicial review expressly conferred by the Natural Gas Act, giving rise to the third reason stated in the petition why the writ of certiorari should be granted.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

The pertinent provisions of the Natural Gas Act of 1938 (52 Stat. 821, et seq.; Title 15, U.S.C.A., Sec. 717) are as follows:

Sec 1 (b). "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Section 4 (a). "All rates and charges made, demanded, or received by any natural-gas company for, or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b). "No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c). "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and

charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

Section 5 (a). "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

Section 6 (a). "The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property."

Section 19 (b). "Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be

modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)."

Appendix B Exhibit 138